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IN THE

Supreme Court of the United States

October Term, A. D. 1938

No. 603

MONTGOMERY WARD & COMPANY, INC.,
an Illinois corporation,

Petitioner,

vs.

THE TOLEDO PRESSED STEEL COMPANY,
an Ohio corporation,

Respondent:

BRIEF FOR PETITIONER IN REPLY TO BRIEF
FILED BY RESPONDENT FEBRUARY 11, 1939.

CARL V. WISNER,

Solicitor for Petitioner.

ANTHONY WILLIAM DELLER,

CARL V. WISNER, JR.,

Of Counsel.

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THE TOLEDO PRESSED STEEL COMPANY, an Ohio corporation,
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**BRIEF FOR PETITIONER IN REPLY TO BRIEF
FILED BY RESPONDENT FEBRUARY 11, 1939.**

Foreword.

Respondent herein, petitioner in Nos. 166, 167, filed an original brief on February 11, 1939, entitled not only in the latter causes, to which petitioner herein is not a party, but in this cause as well. It is understood that respondent herein intends to file a supplemental brief, not only in causes Nos. 166, 167, but also in this cause, after respondent's brief in causes Nos. 166, 167 has been filed.

Respondent's brief filed herein seeks to sustain the judgment of the Second Circuit by reference to both records. The treatment of the subject by respondent is so manifestly unfair that petitioner is prompted to file this brief in order that the errors assigned in the instant case may be fairly presented. Further, in some respects, respondent has de-

parted from the record and proceeded *ad libitum*, governed only by its own impressions, to which vagaries, it is felt, the Court's attention should be called.

Unless otherwise specified, references are to the Second Circuit record.

Reply to p. 8, respondent's brief.

Respondent states, at the top of p. 8, that the District Court in the instant case "quite properly deferred to the prior decision in the appellate tribunal." This point was also mentioned by Judge Manton when he remarked (R. 449) "The court below felt obliged to follow" the Sixth Circuit decision. Such an inference is not to be drawn from the opinion filed by the District Court (R. 424-430). Judge Simons' decision turned principally upon the question of mechanical skill under the prior art. The District Court below reached a similar conclusion upon different evidence. The Court, however, further found the following:

1. That claims in suit were aggregative.
2. That petitioner was using a prior art device.
3. That such prior art device might be employed without change for the purposes of the patent.
4. That the prior art device met the qualification tests of highway commissions.

Thus respondent's conclusion that Judge Moscovitz deferred to the Sixth Circuit decision is not borne out by his findings.

Under point "1" of "Summary of Argument" respondent has made an admission which precludes any possibility of validity of its patent. This admission is that old or prior art elements can be operated to produce the results of the patent in suit, although they may not have been used

prior to the patent for such a purpose and were not originally intended to be used for such purpose. Petitioner has discussed the law bearing upon the application of old devices to new uses on pp. 53-59 of its original brief. Respondent's admission at this point forcibly brings into effect the rules cited by petitioner.

Reply to pp. 12-13, respondent's brief.

Respondent here quotes at length from the opinion of Judge Manton, below, wherein he sought to differentiate the Rutz patent as an anticipation from the patent in suit. It is believed all reference to the Rutz specification, insofar as it discusses the Rutz device as a flash igniter, is unnecessary, and can only tend to confuse the issues.

The significant feature of Rutz is the hood 8, and the supporting spider or flange 6, which have the same principles of operation as the flame guard of the patent in suit, (R. 127, f. 379; see Petitioner's Brief, p. 7).

Toward the bottom of p. 12 respondent quotes from the opinion of Judge Manton:

"In the Rutz patent there is no means for heating the cap if its use there were desirable."

Both Judge Manton and respondent have ignored the testimony of Dr. Luckiesh, petitioner's expert, on this point, as follows, (R. 111): "XQ 277. You understand that that cap is not to be heated at all, in other words, that the pilot is so positioned that it does not heat that cap? A. Of course it is not so, because all you have to do is put your hand on it."

The quotation from Judge Manton at the bottom of p. 12 of respondent's brief, in reference to the importance of heating the cap of the patent in suit, should be considered in the light of the quotation from *Carlton v. Bokee*, 17 Wall.

463, set out on p. 40 of petitioner's brief, as well as in the light of the disclosures in Dr. Luckiesh's work on Artificial Light, and in the Malcov specification, referred to on p. 46 of petitioner's brief, and to the following statement of respondent's expert on cross-examination (R. 222):

"XQ 241. Ordinarily, however, without some particular attention being directed to insulating or some other feature of that kind to prevent the wick tube from becoming hot, it becomes hot as a matter of course."

A. You can design a thing for it to become hot, and you can design for it not to become hot, prevent it from becoming hot, and you can let it alone to take its own course. You can do any of these three things."

In view of such facts, any claim to invention in this feature is ill-advised.

The statement of Judge Manton, quoted at the top of p. 13 "Rutz had no problem of maintaining the flame under conditions of wind and rain" is contrary to definite evidence offered by petitioner that Rutz designed his device to protect his flame from wind and the equivalent of rain, the difference as to rain being one of degree only (R. 393, f. 117).

Reply to p. 14, respondent's brief.

Here respondent seeks to make something of a play upon phraseology between "principles of operation" and "function." After twice having stated that the "principles of operation remain the same," when queried whether there was any change in function when the Rutz hood was transferred from a flash igniter to a torch body, Dr. Luckiesh finally stated that the function is different.

It is obvious that Dr. Luckiesh understood that the cross-examiner by "function" meant "use." If he had been informed that by "function" the *abstract effect* of a device

was meant (see *Corning v. Burden*, 15 How. 252), the expert would have continued to answer, "The principles of operation remain the same."

Reply to p. 15, respondent's brief.

At the top of p. 15, respondent seizes upon Dr. Luckiesh's statement that he never associated the Rutz hood with wind. Nothing ever prompted Dr. Luckiesh to associate it with wind since he was never concerned with the problem of designing an efficacious highway torch. Any reference to this statement is clearly beside the point.

Reply to p. 16, respondent's brief.

Respondent here tries to support its proposition that Dr. Luckiesh did not understand the Malcov disclosure. It is to be noted that respondent has omitted, where asterisks have been interposed, a portion of the testimony. The omitted portion is as follows:

"XQ 210. Although you had different ideas to start with, eventually, you did come to an agreement?"

A. As a matter of fact, as I looked it over, I quite agreed with the two others, my first view of it, and they had been studying it.

"The Court: You mean they agreed with you?"

"The Witness: No, I found my diagnosis of it checked with what they had concluded, but it is a very difficult thing because it did not describe in words.

"The Court: Did you change your opinion?"

"The Witness: No.

"The Court: Did they come around to your opinion?"

"The Witness: No. They had the same opinion independently. They asked me what I thought this was

and what that was, and my recollection is that I happened to agree with them."

In view of the foregoing omitted portion, there can be no doubt of Dr. Luckiesh's understanding of the Malcov structure, and of the careful manner in which he reached his conclusion. (R. 78-79; ff. 234-5).

Respondent's reference to the multiplicity of wick tubes in the Malcov structure is beside the point. Malcov had a clever device for snuffing his flame by elevating his burner structure and its supporting tube to cut the flame away from the wick end and its source of fuel supply. Petitioner's model of Malcov is true, but its pertinency would not have been affected if, for convenience, the multiplicity of wick tubes had been omitted from the model.

At the bottom of p. 17, respondent alludes to the omission in the model of the packing of asbestos or other non-combustible material from the wick end. It is to be observed however, that this feature is not made a part of the drawings, which are equally a disclosure with the specifications.

Reply to p. 19, respondent's brief.

The "tests" conducted by Dr. Olsen, respondent's expert, are here alluded to. The best explanation of Dr. Olsen's tests that could be elicited on cross-examination was that he set some flares out on the fire escape about the fourth floor of the Brooklyn Polytechnic Institute, watched them burn, and took his wind velocity observations from the weather bureau report for that day (R. 236 XQQ 273-280). This is to be contrasted with the care which Prof. Croft used to eliminate all possible variables.

Reply to p. 21, respondent's brief.

Respondent here deprecates the prior art, except Rutz and Kahn, as "paper patents." The fact that 15,000,000 Rutz hoods went into public use indicates that the device was efficacious in protecting the flame of the flash igniter from being extinguished by winds or drafts, or the boiling over of a pot—a more intense precipitation of liquid than any rain.

The fact that the other patents may not have been used is unimportant. The test of an anticipation is "what is disclosed in the specification and made known to the world." *Minerals Separation etc. Corp. v. Magma Copper Co.*, 250 U. S. 400, 402, per Mr. Justice Holmes. This must, of course, be equally true of patents used as the basis for the argument that in view of the prior art, only mechanical skill was involved.

Reply to p. 22, respondent's brief.

If, as counsel says, "the problem was to preserve this open, unsteady flame and to maintain it under all kinds of weather conditions, without enclosing it", the answer is to be found in the Rutz hood 8, and the precise suggestion of how it might be done is found in Wall. (R. 344). Of course the Malcov drawing (R. 325) shows a guard protecting an "open, unsteady flame", whose source, like the flame of the patent in suit, is the end of a wick within the guard.

Reply to pp. 23, 24, respondent's brief.

When one analyzes the "unexpected results" discovered by Dr. Olsen, summarized in points 1 to 4 on these pages, one wonders whether first, patentees discovered that kerosene must be raised to the flash point before it will ignite,

and that in this respect it differs from gasoline and coal gas; second, whether they discovered that any metal surface about which a flame is playing will become hot, with an ensuing flow of heat to the colder portions, and that if these colder portions are in contact with a wick tube leading into a fuel reservoir, the temperature of the fuel in the reservoir will be raised.

Respondent cannot seriously contend that these "unexpected results" were discovered by patentees, and patentees supposed inventive act is thus relegated to the discovery that the Rutz hood 8, or its equivalent, if placed around a wick tube, will protect a flame from wind and rain. Since Rutz, and not patentees, was the first to discover that his hood would satisfactorily protect a flame, the award of a patent for changing the environment of the Rutz hood 8 from the kitchen to the highway must be a nullity.

Reply to p. 25, respondent's brief.

Respondent here emphasizes Dr. Olsen's remark that the Anthes and the Toledo flares were as alike as "two peas in a pod." Considering Dr. Olsen's testing methods referred to above in reply to p. 19 of respondent's brief, which comprised setting the flares out on a fire escape, he may actually have reached such a conclusion. This testimony, however, must be weighed in the light of the witness' limited opportunity for observation.

Reply to p. 28, respondent's brief.

On the question of the supposed fuel saving, the Court is respectfully referred to pp. 17-18 and 50-51 of petitioner's original brief.

As we have pointed out, respondent has never given the proposition a fair test, so the only reliable information on

the subject is petitioner's evidence. Judging from its brief, respondent evidently believes that reiteration of its premise will overcome that premise's unsound foundation. But such a premise cannot be accepted as a postulate for the award of the monopoly which petitioner is here seeking.

Any oil saving which respondent's patentees accomplish has resulted from shortening the height of the wick, which can be done as well with the open-flame torch as with one to which a flame guard has been added. It is the common experience of anyone who has ever used a kerosene lamp or lantern, that if the wick is raised too high, unwarranted consumption of fuel is the natural result.

Public acceptance has been discussed on p. 47 of petitioner's original brief. Licenses, mentioned by respondent on p. 29, carry but little weight,, (see *John E. Thropp's Sons Co. v. Seiberling*, 264 U. S. 320, 330) and as the present controversy indicates, three substantial manufacturers have refused to accept licenses on respondent's terms.

On p. 39, respondent characterizes its royalty of three cents per burner as "low." Such, naturally would be respondent's conclusion, although the record contains no opinion evidence to support it.

Respondent sells its torches at \$16.00 per dozen; less fifty and ten per cent. (R. 26, f. 78) which is about sixty cents each. The three cents per torch is a five per cent. royalty, which is high, by any standard, at respondent's prices. It is particularly distasteful to a manufacturer when one considers that use of the Rutz hood 8 is open to anyone, and that it is equally capable of qualifying under the severe tests passed by the burner of the patent in suit.

It is to be observed that the three cent per burner royalty is a constant. It's tendency is to create an artificially high price structure. The record does not disclose at what price petitioner sells its flares, but if that price be forty cents, instead of respondent's sixty cents, the royalty becomes

seven and one-half per cent. instead of five per cent., which latter rate is without any economic justification.

Reply to pp. 30-39, respondent's brief.

The supposition that others were unsuccessful in working out the problems solved by respondent's patentees is discussed at length on pp. 15-17 and 43-47 of petitioner's original brief. We may add that such an argument was considered in *Paramount-Publix Corp. v. American In-Ergon Corp.*, 294 U. S. 464, 476, where it was said, per Mr. Justice Stone,

"The bare fact that several inventors, in the early stages of sound reproduction, working independently, of whose knowledge and skill in the photographic art we know little or nothing, failed to resort to a method well known to that art, for printing a combination film for which there was then no generally recognized need, does not give rise to the inference of invention."

The facts here are somewhat parallel, and it is submitted equally that no "inference of invention" should result from the activities of either Currie or Kerwin, the first of whom failed to pursue a thought which he admitted must have been in his mind (R. 175, f. 523) and the second of whom made but one experiment.

Reply to pp. 35-36, respondent's brief.

Respondent lays much stress upon the presumption of validity referred to by Mr. Justice Cardozo in *Radio Corp. v. Radio Engineering Laboratories*, 293 U. S. 1, 2, 7. The facts of the instant cases are not those which Mr. Justice Cardozo was considering in the quotation in the footnote at the bottom of p. 36. The defense interposed in the *Radio Engineering* case was that De Forest's patents were in-

valid because of prior invention by Armstrong. Prior adjudications of interference proceedings had been adverse to Armstrong, the matter had been relitigated in two additional actions by other parties to compel the issue of patents, and Armstrong was again seeking to relitigate it in the *Radio Engineering* case on substantially identical evidence. Such are not the facts of the instant cases.

It is submitted, however, that no presumption of validity exists in the instant cases, although the point here raised has never before been passed on by this court, so far as we are able to determine from the reports.

None of the patents relied on by petitioner in No. 603, and only one of the five patents referred to by Judge Simons in his opinion, were considered by the Examiner during the prosecution of the patent in suit. It has been repeatedly held by Circuit Courts of Appeal that there is no presumption of validity as against art not cited in the patent office. See *Butler Mfg. Co. v. Enterprise etc. Co.*, 8th Cir., 81 F. 2d 711, 716; *Mettler v. Peabody Eng. Corp.*, 9th Cir., 77 F. 2d 56; *Elliott & Co. v. Youngstown Car Mfg. Co.*, 3d Cir., 181 F. 347, 349; *American Soda Fountain Co. v. Sample*, 3d Cir., 130 F. 145, 149; *Westinghouse etc. Co. v. Toledo etc. Co.*, 6th Cir., 172 F. 371, 392; Walker on Patents (Deller's Ed.) Vol. 3, p. 2009, Sec. 701.

Reply to pp. 36, 37, respondent's brief.

Respondent complains of being "a small company located in Toledo, Ohio," lacking the "corps of engineers" with which industry is ordinarily armed. While respondent's location in Toledo is to be inferred from its name, the record is silent on its size or industrial importance, as it is equally silent on the size or importance of Anthes Force Oil Co., which manufactures the accused device herein.

As to the "corps of engineers", patentee Close, an officer of respondent, admits to being an engineer (R. 40, f. 120), which adds to respondent's industrial stature.

Respondent does not explain, however, what bearing the suppositions here referred to have on the validity of the patent in suit. If a patent's validity varied in inverse proportion to its owner's industrial importance, the proposition might be pertinent.

Reply to pp. 40-43, respondent's brief.

In the middle of p. 40, as to the Bolser, Kari-Keen and Anthes flares, respondent states they differ from its flares "only in that the guard in the infringing devices has been elevated a short distance above the fuel tank and the air inlet openings placed in the flange which supports the cap instead of in the sides of the cap."

This is not a true description of the Bolser and Kari-Keen devices, each of which has its air inlet openings in the side of the cap. This is clearly shown in the drawing of the Bolser flare on p. 319 of the record in the instant case and of the Kari-Keen flare on p. 321; the Anthes flare guard, like Rutz, has its air inlet holes in the supporting flange as respondent describes.

Respondent admits that the Anthes structure differs from that of the patent. These differences are completely pointed out on pp. 21-23 of petitioner's original brief. The performance as well as the structures are different and we believe petitioner's discussion of infringement on pp. 61-62 adequately covers the points.

It is to be observed from respondent's discussion of infringement, however, that respondent in its brief has resorted to Judge Hahn's theory that the patent in suit's "main purpose and teaching" is to "protect the flame at its source."

Judge Hahn, of course, did not have the benefit of petitioner's evidence in the instant case that the Rutz hood 8 likewise protected the flame at its source. Nor had Judge Hahn the benefit of the Malcov and Wall disclosures. Whether he would have held to his premise in view of such evidence is very doubtful.

Whatever "the main purpose and teaching" of the patent in suit was, obviously, in view of the Rutz hood 8, it could not have been "protecting the flame at its source." Any arguments based upon Judge Hahn's opinion must necessarily fail, and in view of the art, infringement can be found only in substantial identity with the structure disclosed in the patent drawing. On p. 40 respondent admits that such identity does not exist.

We submit, therefore, on the question of infringement, that the test used by Mr. Chief Justice Fuller in *Kokomo Fence Machine Co. v. Kutselman*, 189 U. S. 8, 24, is applicable here:

"The machines lack that identity of means and identity of operation which must be combined with identity of result to constitute infringement."

All of which is respectfully submitted.

CARL V. WISNER,
Solicitor for Petitioner.

ANTHONY WILLIAM DELLER,
CARL V. WISNER, JR.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 166, 167, 603.—OCTOBER TERM, 1938.

The Toledo Pressed Steel Company,
Petitioner,

vs.

Standard Parts, Inc.

The Toledo Pressed Steel Company,
Petitioner,

vs.

Huebner Supply Company.

On Writs of Certiorari to
the United States Circuit
Court of Appeals for the
Sixth Circuit.

Montgomery Ward & Company, Inc.,
Petitioner,

vs.

The Toledo Pressed Steel Company.

On Writ of Certiorari to
the United States Circuit
Court of Appeals for the
Second Circuit.

[May 29, 1939.]

Mr. Justice ~~BURLEN~~ delivered the opinion of the Court.

These are patent infringement suits brought by the Toledo Pressed Steel Company, owner of Withrow and Close Patent No. 1,722,708, issued October 22, 1929, for a burner for use in outdoor warning signals such as construction torches and truck flares. The first two suits were brought in the federal court for the northern district of Ohio. It filed an opinion indicating the facts that it deemed established by the evidence and without formal findings held the patent valid and infringed by the Bolser and Kari-Keen flares respectively sold by the defendants. The circuit court of appeals for the sixth circuit held the patent invalid for want of invention and reversed. 93 F. 2d 336. The other suit was brought in the federal court for the eastern district of New York. It made findings as required by Rule 70½, held plaintiff's patent invalid, and dismissed the bill. The circuit court of appeals for the second circuit held the patent valid and infringed by the Anthes flare sold by the defendant, and reversed. 99 F. 2d 806.

In the interest of plaintiff, seeking to uphold the patent *prima facie* valid, and of the public, liable to exclusion from manufacture, use, or sale in virtue of the right it purports to confer, final adjudication as to validity is of primary importance. The patent in suit relates to torches for guarding street obstructions and to flares, which are large torches, for warning that vehicles are stopped on the road.

Formerly, red lanterns were much used. But, after general use of automobiles having red tail lights to some extent resembling them, they did not serve so satisfactorily as before. Open-flame torches came to be extensively employed. The motion of the luminous flame distinguishes them from other signals. But there were complaints that they were sometimes extinguished by wind or rain.

Open-flame torches in use for some years before patentees claimed invention, included those which were bomb-shaped, flat bottomed, weighted for stability, and with an opening in the top for a wick. That type was well known, at least after the patent covering it, McCloskey No. 1,610,301, was issued December 14, 1926. In 1929 it was held invalid by the circuit court of appeals for the sixth circuit for lack of invention and because anticipated. *McCloskey v. Toledo Pressed Steel Co.*, 30 F. 2d 12. Plaintiff had a large business in the manufacture and sale of torches, including the McCloskey type. It advertised that they would burn in all kinds of weather; having received many complaints of extinguishment by wind and rain, patentees, respectively plaintiff's president and vice president, set about producing something to make them dependable and to serve as represented. Within a year, but after experiments, trials, and failures, they brought forward the patented device.

The specification states that the claimed invention particularly relates to devices to increase efficiency and to prevent flame extinguishment. It declares that the objects of the invention are to provide a simple attachment to attain those ends and a burner so constructed that liability of extinguishment by wind or rain will be reduced to a minimum. It further says that with the described construction and arrangement consumption of oil and wick is materially decreased.

The claims involved are printed in the margin.¹ Considered together, unobscured by artificiality in their statement, it fairly may be said that they show that all that the patentees did was to put over the wick of a torch, well known in the art, an inverted metal cuplike cap having holes in its sides, some to let in air for combustion and others to let out flame. The cap was also well known and had been used as a part of other devices for the protection of kerosene and other flames.

A number of devices patented earlier than plaintiff's included the elements essential to its burner.

¹ In all the cases, claims 2, 3, 11 and 12 are involved. In Nos. 166 and 167, claim 13 is also involved. In No. 167, claims 1, 6 and 7 are also involved.

1. In a device of the class described, a torch body having an opening at its upper end, a wick-receiving tube extending into said opening, and a cap disposed on the outer side of said torch body to enclose the outer end of the wick, said cap having an imperforate upper wall, lateral flame openings, and air openings below the flame openings.

2. In a device of the class described, a torch body having an opening for a wick, and a flame guard for said wick mounted on the outside of said torch body, said guard including a cap provided with an imperforate top wall and lateral flame openings adapted to emit a luminescent flame, and air ports.

3. In a device of the class described, a construction torch having an opening at its upper end for a wick, means to hold the wick in place, and a guard fitting over the outer end of the wick but spaced from the sides thereof, said guard having an imperforate top wall and side flame and air openings.

4. In a device of the class described, a torch body having a wick-opening, a tube for receiving the wick and adapted to extend inside of the torch body, an outwardly extending flange in the region of said wick-opening, and a cap connected to said flange and having an imperforate top wall, said cap having a flame opening adjacent its outer end and an air port beneath said flame opening.

5. In a device of the class described, a torch body having a wick-opening, a cap for enclosing the outer end of the wick but spaced from the sides thereof, an imperforate end wall for said cap, said cap having a series of flame openings and a series of air ports beneath the flame openings, and a disc adapted to embrace the wick and having a flanged upper portion disposed in the region of said air ports.

11. A burner for a construction torch adapted to emit a luminescent flame and comprising a wick holder having a portion in contact with the wick and a supporting and heat-receiving flange, and means enclosing a space above said flange and surrounding the wick, except for provision for lateral exit of flame and restricted entrance of air for combustion.

12. A burner for a construction torch adapted to emit a luminescent flame and comprising a wick holder having a portion in contact with the wick and a lateral flange, and a cap enclosing and spaced from the end of the wick and having an imperforate top and provision for lateral exit of flame and entrance of air, and the bottom of the cap being in heat conducting relation to said flange.

13. A burner for a construction torch adapted to emit a luminescent flame and comprising a wick holder having a portion in contact with the wick and a laterally extending flange and a cap over the wick, the cap having an imperforate, dome-shaped top wall, a lateral flame opening approximately even with the top of the wick and a smaller opening for the inlet of air lower than the flame opening and above the lower edge of the cap, said lower edge being in heat-transferring relation to said flange.

Billingham Patent, No. 191,031, issued August 15, 1876, related to torches for lighting street-lamps. It shows a wick-type torch with a tube-like cap having holes, some to let in air, and others to let the flame come out. This cap, imperforate at the top, serves to prevent extinguishment of the flame by wind or rain. Almond Patent, No. 193,796, issued August 7, 1877, related to vapor burners for heating. The device, some parts detached, serves as an illuminating lamp consisting of a body, a wick holder, a cap, a flange having a rim supporting a tube closed at the top. Holes are in the rim to admit air; larger ones in the tube are to let the flames out. Rutz Patent, No. 1,101,146, issued June 23, 1914, covers a flash igniter for gas stove burners. It has a cap to guard the flame and adapted to emit flames extending from the igniter to the gas burners to be lighted. This cap, like plaintiff's, has a supporting and heat receiving flange, a means to enclose the space above the flange and a restricted entrance to admit air for combustion. The record shows that the Rutz hood has been used to achieve the identical results attained by plaintiff's device.

There are other patents, issued before patentees developed the structure in suit, that may be referred to as relevant to the issue of invention in this case. Examples of these are cited in the margin.²

The torch body was old in the art to which it belonged. The cap, as part of devices used in other fields, was old and useful to prevent extinguishment of flames by wind or rain and to permit flames to extend through holes to the open air. The problem patentees set for themselves was to prevent extinguishment while preserving usefulness of the flames as warning signal. They solved it by merely bringing together the torch and cap. As before, the torch continued to produce a luminescent, undulating flame, and the cap continued to let in air for combustion, to protect the flame from wind and rain and to allow it to emerge as a warning signal. They performed no joint function. Each served as separately it had done. The patented device results from mere aggregation of two old devices, and not from invention or discovery. *Hales v. Van Wormer*, 20 Wall. 353, 368. *Reckendorfer v. Maber*, 92 U. S. 347, 357. *Lincoln Co. v. Stewart-Warner Corp.*, 303

² Blake Patent, No. 453,335, June 2, 1891. Heston Patent, No. 270,561, January 13, 1883. Brekle Patent, No. 192,130, June 19, 1877. Kahn Patent, No. 1,175,527, March 14, 1916.

U. S. 545, 549-50. On the records before us, it is impossible to hold that production of the patented device required more than mechanical skill and originality attributable to those familiar with the art of protecting flames of kerosene and other burners. *Albion Theatres v. Tri-Ergon Corp.*, 294 U. S. 477, 486; *Powers-Kennedy Co. v. Concrete Co.*, 282 U. S. 175, 186; *Concrete Appliances Co. v. Gomery*, 269 U. S. 177, 184, 185; *Hollister v. Benedict Manufacturing Co.*, 113 U. S. 59, 72-73.

As evidence in its favor on the question of invention, plaintiff cites efforts to find something useful to protect open-flame torches from extinguishment by wind or rain put forth by one engaged in operation of a street railway and by another employed by a manufacturer of lanterns. But it does not appear that either was familiar with the relevant prior art. Nor is there any evidence of general or widespread effort to solve the problem here involved. There is nothing that tends to raise what patentees did to the realm of invention. See *Paramount Corp. v. Tri-Ergon Corp.*, 294 U. S. 464, 476. Plaintiff also brings forward the fact that some manufacturers, including three substantial ones, have taken licenses under its patent. It does not appear that these licensees have made wide or successful use of the device. Lack of novelty being clearly shown, acceptance of license under the circumstances of this case, is without weight. *Thorpp's Sons Co. v. Seiberling*, 264 U. S. 320, 330. *John T. Riddell v. Athletic Shoe Co.*, 75 F. 2d 93, 95. And similarly without significance on the question of novelty is the fact that, as plaintiff claims, utility resulted and commercial success followed from what patentees did. *Firestone Tire & Rubber Co. v. United States Rubber Co.*, 79 F. 2d 948, 954.

It results that the decrees in Nos. 166 and 167 must be affirmed, and that in No. 603 must be reversed.

It is so ordered.

Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.